

# EUROPEAN PARLIAMENT



*s e s s i o n d o c u m e n t s*

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28 July 1998

A4-0290/98



## REPORT

on the draft Council Decision amending Council Decision 88/591/ECSC/EEC/Euratom establishing the Court of First Instance of the European Communities to enable it to give decisions in cases when constituted by a single Judge (6290/97 - C4-0218/97 - 97/0908(CNS))

Committee on Legal Affairs and Citizens' Rights

Rapporteur: Mr David Martin

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PE 225.392/fin.

\* Consultation procedure  
simple majority

\*\*I Cooperation procedure (first reading)  
simple majority

\*\*II Cooperation procedure (second reading)  
simple majority to approve the common position  
majority of Parliament's component Members to reject or amend the common position

\*\*\* Assent procedure  
majority of Parliament's component Members to give assent  
but simple majority under Articles 8a, 105, 106, 130d and 228 EC

\*\*\*I Codecision procedure (first reading)  
simple majority

\*\*\*II Codecision procedure (second reading)  
simple majority to approve the common position  
majority of Parliament's component Members to adapt a declaration of intended  
rejection of the common position, and amend the common position or confirm its rejection

\*\*\*III Codecision procedure (third reading)  
simple majority to approve the joint text  
majority of Parliament's component Members to reject the Council text

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By letter of 25 April 1997 the Council consulted Parliament, pursuant to Article 168a(2) of the EC Treaty, Article 32d of the ECSC Treaty and Article 140a of the EAEC Treaty, on the draft Council Decision amending Council Decision 88/591/ECSC/EEC/Euratom establishing the Court of First Instance of the European Communities to enable it to give decisions in cases when constituted by a single Judge (6290/97 - C4-0218/97 - 97/0908(CNS)).

At the sitting of 28 May 1997 the President of Parliament announced that he had referred this proposal to the Committee on Legal Affairs and Citizens' Rights as the committee responsible and to the Committee on Institutional Affairs for its opinion.

At its meeting of 17 and 18 June 1997 the Committee on Legal Affairs and Citizens' Rights appointed Mr David Martin rapporteur.

It considered the proposal and the draft report at its meetings of 2 and 3 February, 24, 25 and 26 February, 16 and 17 March, 27 and 28 April, 23, 24 and 25 June and 21, 22 and 23 July 1998.

At the last meeting it adopted the draft legislative resolution by 8 votes to 2, with 2 abstentions.

The following were present for the vote: De Clercq, chairman; Palacio Vallelersundi, vice-chairman; D. Martin, rapporteur; Anastassopoulos, Barzanti, Casini, Cassidy, Ewing, Falconer, McIntosh, Mosiek-Urbahn, Thors and Wijnsbeek.

The opinion of the Committee on Institutional Affairs is attached.

The report was tabled on 28 July 1998.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

A  
LEGISLATIVE PROPOSAL

**Draft Council Decision amending Council Decision 88/591/ECSC/EEC/Euratom establishing the Court of First Instance of the European Communities to enable it to give decisions in cases when constituted by a single Judge (6290/97 - C4-0218/97 - 97/0908(CNS))**

The draft is approved.

## DRAFT LEGISLATIVE RESOLUTION

**Legislative resolution embodying Parliament's opinion on the draft Council Decision amending Council Decision 88/591/ECSC/EEC/Euratom establishing the Court of First Instance of the European Communities to enable it to give decisions in cases when constituted by a single Judge (6290/97 - C4-0218/97 - 97/0908(CNS))**

**(Consultation procedure)**

The European Parliament,

- having regard to the draft Council Decision, 6290/97 - 97/0908(CNS),
  - having been consulted by the Council pursuant to Article 168a(2) of the EC Treaty, Article 32d of the ECSC Treaty and Article 140a of the EAEC Treaty (C4-0218/97),
  - having regard to Rule 58 of its Rules of Procedure,
  - having regard to the report of the Committee on Legal Affairs and Citizens' Rights and the opinion of the Committee on Institutional Affairs (A4-0290/98),
1. Approves the draft Council Decision;
  2. Recommends that the Court of Justice submit to the European Parliament and the Council a report assessing the implementation of this Decision three years after its entry into force;
  3. Instructs its President to forward this opinion to the Court of Justice, the Council and Commission.

## **B**

### **EXPLANATORY STATEMENT**

The Court of First Instance (CFI) was established in 1989 essentially to alleviate the workload pending before the Court of Justice. Since then, the number of cases brought before it each year has been increasing. From 55 cases registered in 1990, the number increased to 115 in 1992 and to 224 in 1995. The CFI fears that a further substantial increase in the number of cases is to be expected as a result of litigation relating to intellectual property rights, in particular that resulting from the application of Council Regulation No 40/94 of 20 December 1993 on the Community trade mark. The CFI considers that the introduction of the single Judge would cope with the foreseeable difficulties and improve the way the CFI operates in its present composition.

The Court of Justice therefore submitted an appropriate proposal to the Council on 7 February 1997. Two particular features of the current proposal are worth noting: one relates to the procedure being used and the other to the limited scope of the consultation of Parliament.

In the light of the substance of the proposal, one has to ask whether the single Judge is the most appropriate response at this stage of development of the Community judicial system. In this context, account will be taken of the evolution of the CFI's workload to date and an evaluation of the risks of an increased backlog referred to above.

#### **I. THE PROCEDURE FOR AND THE SCOPE OF THE CONSULTATION OF PARLIAMENT**

##### **A. The procedure**

Contrary to the general rule whereby the Commission is the only Community institution which submits legislative proposals to the Council, or to Parliament and the Council, under Article 189b (codecision procedure), in this particular case it is the Court of Justice which submitted a proposal to the Council. (This procedure is so exceptional that it is not even provided for in Parliament's Rules of Procedure!)

**Article 168a(2) of the EC Treaty** (not modified by the Treaty of Amsterdam) lays down that: 'At the request of the Court of Justice and after consulting the European Parliament and the Commission, the Council, acting unanimously, shall determine (...) the composition of the Court of First Instance and shall adopt the necessary adjustments and additional provisions to the Statute of the Court of Justice. Unless the Council decides otherwise, the provisions of this Treaty relating to the Court of Justice, in particular the provisions of the Protocol on the Statute of the Court of Justice, shall apply to the Court of First Instance'.

This proposal has been pending before the Council since February 1997. The Council's position on this matter has not been published. The Commission forwarded its opinion to the European Parliament by letter of 15 June 1998.

## **B. The scope of the consultation of Parliament**

This proposal seeks to amend Council Decision 88/591/ECSC/ EEC/ Euratom establishing a Court of First Instance, a decision based on Article 168a of the EC Treaty, Article 32d of the ECSC Treaty and Article 140a of the EAEC Treaty.

Its sole purpose is to reword Article 2(4) of that Decision as follows:

'4. The Court of First Instance shall sit in Chambers of three or five judges. The composition of the Chambers and the assignment of cases to them shall be governed by the Rules of Procedure. In certain cases governed by the Rules of Procedure the Court of First Instance may sit in plenary session **or be constituted by a single Judge**'.

It is this legislative proposal and this alone that Parliament is entitled to adopt, reject or amend under Rule 58 of the Rules of Procedure, which applies by analogy. Parliament is therefore prevented from considering the draft amendments to the Rules of Procedure of the CFI which were forwarded by the President of the CFI to the Council in accordance with Article 168a(4) of the EC Treaty.

That provision reads:

'4. The Court of First Instance shall establish its Rules of Procedure in agreement with the Court of Justice. Those rules shall require the unanimous approval of the Council'.

It is, however, rather difficult to assess the pending legislative proposal without simultaneously considering the draft amendments to the Rules of Procedure of the CFI, since they determine the circumstances in which a single Judge may be called upon to give a decision in a case.

Accordingly, when assessing the current legislative proposal, the Committee on Legal Affairs and Citizens' Rights decided to consider in detail the draft amendments to the CFI's Rules of Procedure (see below).

## **II. THE CONTEXT OF THE PROPOSAL**

### **A. The evolution of the workload of the CFI**

The explanatory memorandum to the legislative proposal notes that the number of cases brought before the CFI has been constantly increasing since 1989. This development is the result in particular of the successive extensions of jurisdiction granted by the Council in 1993 and 1994.

It is true that the jurisdiction of the CFI has been progressively extended. Under Council Decisions 93/350 of 8 June 1993 (OJ L 144, p. 21) and 94/149 of 7 March 1994 (OJ L 66, p. 29), it has acquired general jurisdiction to hear and determine at first instance all direct actions brought by natural and legal persons; in addition, it has been granted jurisdiction in completely new areas under Regulation No 4064/89 on the control of concentrations between undertakings (OJ L 395, p. 1), under Regulation No 40/94 on the Community trade mark (OJ L 11, p. 1) and under Regulation No 2100/94 on Community plant variety rights (OJ L 227, p. 1).

The Treaty on European Union has paved the way for an acceleration of that process with the amended version of Article 168a, which makes it possible for jurisdiction to be granted to the CFI

to hear and determine all actions, whether brought by natural or legal persons or by institutions or Member States, except for questions referred for a preliminary ruling under Article 177. More specifically, the cases currently pending before the CFI concern above all the application of the rules on competition, on State aids, on measures to protect trade and on anti-dumping measures, on the various Community Structural Funds and on disputes between the Communities and their employees.

It is further suggested in the proposal that the capacities of the CFI are already 'barely sufficient' to deal with the current business and that 'unless appropriate measures are taken to ensure its proper functioning, the Court will no longer be in a position to carry out the task entrusted to it if the forecast concerning trade-mark litigation proves to be correct and if the number of cases brought in fact doubles in the near future'.

The introduction of the single Judge is basically intended to enable the CFI to cope with the litigation which will ensue from the application of Council Regulation No 40/94 of 20 December 1993 on the Community trade mark.

According to the estimates made by the Office for Harmonisation in the Internal Market (OHIM) in Alicante before it took up its activities, on the basis of a forecast of 15 000 applications for registration in 1996, the number of actions that will be brought against decisions of its Boards of Appeal might exceed 400 per year as from 1997. The CFI states that it 'must be prepared for the volume of litigation relating to the Community trade mark to exceed even these estimates'.

To date, no cases of this type have been brought before the CFI. This does not mean that we can exclude the possibility of a considerable number of cases being brought in the near future.

As for the current situation of the CFI, the statistics show that the number of new cases has not increased dramatically in recent years (except last year with the introduction of 295 cases concerning customs agents): in 1993, 589 cases were brought; in 1994, 397 cases; in 1995, 244 cases; in 1996, 220 cases and in 1997, 624 cases (see Annex 1).

As for the pending cases, the situation is as follows: in 1993, 657 cases; in 1994, 618 cases; in 1995, 612 cases; in 1996, 655 cases and in 1997, 1106 cases. These figures suggest that the CFI has at present a serious backlog (see Annex 2).

It is also worrying to note that the proceedings generally take too long: in 1993, the average length of proceedings was 23.4 months; in 1994, 23 months; in 1995, 41.2 months; in 1996, 28.3 months and in 1997, 29.3 months. (See Annex 3; for complete statistics concerning the CFI, see 'Statistiques générales des travaux du Tribunal - évolution du flux des affaires -' published regularly by the Registrar).

## **B. The measures put forward to cope with the workload of the CFI**

Since the establishment of the CFI, interested parties (in particular members of the legal profession and academics) have put forward proposals designed to create conditions conducive to the operation of the CFI. These proposals were made in particular during preparations for the two most recent amendments to the Treaties through the Treaty of Maastricht and the Treaty of Amsterdam. The Court of Justice and the CFI made their contributions in 1990 for the Treaty of Maastricht and in May 1995 for the Intergovernmental Conference of 1996 <sup>(1)</sup>. Full account has been taken of these two most recent contributions in the preparation of this report.

The four main proposals submitted in this context - as alternatives or concurrently - are the following:

1. The appointment of assistant rapporteurs: the idea is to appoint an expert of proven competence in a specific field; this expert would have research and drafting duties and would attend the hearings and the Court's deliberations.
2. The creation of specialised Chambers: this measure might respond to the foreseeable trend of a progressive specialisation of cases, in particular in areas such as intellectual property rights, staff cases, customs, agriculture, and competition cases; this solution might be acknowledged as a necessity<sup>(2)</sup>.
3. An increase in the number of Judges: in the CFI document referred to above, this proposal was described as 'inevitable'; it was stressed that such an increase would make it possible for a greater number of Chambers to be formed and a greater number of cases dealt with; this solution constitutes the most effective way of dealing with the increase in litigation; it also has the advantage that it could be implemented by a simple amendment to the Decision of 24 October 1988; given the financial implications of this proposal, however, the CFI must prove that the increase and importance of the pending cases justify such a measure and that they have exhausted other possibilities of coping with the workload, namely through a simplification of the Rules of Procedure so as to decide cases more speedily.
4. The single Judge: this is the subject of the current proposal; the CFI presents the advantage of this proposal as follows: 'by reducing the number of Judges called upon to sit in a case, two other Judges are released from attending the hearing and taking part in the deliberations. They can therefore devote the time thus saved to other cases'. The merits of this proposal are at the core of the consultation of Parliament. An assessment of this solution will be given below.

## **III. ASSESSMENT OF THE PROPOSAL**

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<sup>(1)</sup> These contributions were published in 'The activities of the Court of Justice and the Court of First Instance', No 15/95, week from 22 to 26 May 1995.

<sup>(2)</sup> This proposal was suggested by the CFI in its contribution to the IGC, loc. cit., p. 17; it has also been submitted by Mr Cruz Vilaça, former President of the CFI, in 'L'évolution du système juridictionnel communautaire avant et après Maastricht', Hommage Everling; the Court of Justice, in its above-mentioned contribution, seems to approve the idea, loc. cit. p. 10; Mr Everling developed this idea in a document which was distributed to the members of the committee (see PE 212.252).

## **A. The substance of the proposal and the envisaged changes to the Rules of Procedure**

As we have already seen, this proposal seeks on the one hand the amendment of Article 2(4) of Council Decision 88/591 of 24 October 1988 establishing the Court of First Instance of the European Communities and, on the other, various amendments to the Rules of Procedure. Although the two amendments are closely linked, consultation of Parliament relates merely to the proposed amendment of the Council Decision.

### **1. The amendment of Article 2(4) of Council Decision 88/591**

This issue has already been considered at the beginning of this report. The CFI intends to ensure that there will be sufficient flexibility, since this provision does not itself lay down the necessary arrangements but leaves them to the Rules of Procedure, which could change in the light of experience. The principle whereby the CFI normally sits in Chambers composed of three or five Judges thus remains unchanged. Reference of a case to a single Judge is simply optional and is confined to situations determined in the Rules of Procedure.

### **2. The amendments to the Rules of Procedure**

#### **(i) *The criteria governing reference of a case to a single Judge***

The following new paragraph 2 to Article 14 of the Rules of Procedure is proposed:

*'Where neither the questions of law nor fact raised by a case assigned to a Chamber composed of three Judges, nor the importance of that case nor any other special circumstances justify its being heard by three Judges, the case may be delegated to the Judge-Rapporteur in order that he may give a decision as a single Judge. He may refer the case to the Chamber if he considers that these conditions are no longer satisfied.*

*Delegation to a single Judge shall not be possible in cases relating to the application*

- (a) of the rules on competition and on control of concentrations,*
- (b) of the rules concerning aid granted by States,*
- (c) of the rules concerning measures to protect trade.'*

It seems that this text is not definitive and that a different version is currently pending before the Council. However that may be, this provision is fundamental because it governs the criteria for the reference of cases to a single Judge. The reference to a single Judge applies only to cases assigned to a Chamber composed of three Judges. Furthermore, the recourse to a single Judge relates to cases of limited importance and where an established body of case-law already exists. The explanatory memorandum refers in particular to cases such as: staff cases, cases concerning the field of non-contractual liability and, possibly, involving the Community trade mark.

As drafted, this text grants the CFI great scope for interpretation. According to the explanatory note relating to this provision, 'only simple cases and cases of minor importance may be heard by a single Judge'. However, the words 'importance of the case' or 'special circumstances' are likely to be interpreted extensively. If the principle of the single Judge is accepted by the Council, more objective criteria will have to be laid down in order to reinforce the requirement of legal certainty.

To that end, all cases concerning the annulment of a regulation or raising new questions of principle or of a general nature should also be added to the above list. In particular, cases concerning intellectual property, the common organisation of agricultural markets and actions involving the Communities' staff could be heard by a single Judge only where they are manifestly of a repetitive nature, and a constant and extensive body of case-law is applicable, and where the case does not raise any new issue.

**(ii) *The procedure for referring a case to a single Judge***

The following new second subparagraph to Article 51(1) is proposed:

*'The decision to delegate a case to a single Judge under the conditions specified in Article 14(2) shall be taken, on a proposal from the Judge-Rapporteur, by the Chamber composed of three Judges before which the case is pending'.*

In the national legal systems, two different systems exist: sometimes cases are assigned directly to a single Judge on the basis of general criteria such as the matter concerned and the nature of or the value involved in the dispute; sometimes, on the other hand, the cases are at first assigned to a Chamber and may then be subsequently referred to a single Judge by an ad hoc decision of the Chamber taken in the light of the circumstances of the case.

It is the second procedure that the CFI has proposed. The procedure provided for in Article 51(1) upholds the principle of collegiality to the extent that the Chamber will be obliged to select the cases which could be referred to a single Judge.

The practical problem is that, at that stage of the procedure, it is likely that neither the Judge-Rapporteur nor, a fortiori, the Chamber will have sufficient knowledge of the case to be able to assess its complexity.

It is for that reason that the CFI does not specify at what stage of the procedure the decision to refer a case to a single Judge should be taken. In practical terms, the proposal to refer a case to a single Judge should be taken when the Judge-Rapporteur submits the preliminary report referred to in Article 52(1) of the Rules of Procedure.

**(iii) *The powers of the President***

The following new subparagraph to Article 16 is proposed:

*'In cases assigned or delegated to a single Judge, the powers of the President shall be exercised by that Judge'.*

Some provisions of the Rules of Procedure provide for the powers of the 'President'. It follows, for example, that the single Judge may be called upon, under Article 106(2), to replace the President of the Court, where the latter is absent or unable to attend, for the purpose of adjudicating on applications for interim relief.

(iv) *The referral back procedure*

According to the new third paragraph of Article 118:

*'Where the Court of Justice sets aside a judgment delivered or annuls an order made by a single Judge, the President of the Court of First Instance shall assign the case to a Chamber composed of three Judges'.*

(v) *The application for interpretation*

The Court proposes that the following second sentence be added to Article 129(2):

*'If the judgment has been delivered by a single Judge, the application for interpretation shall be assigned to that Judge'.*

**B. Consideration of the proposal**

In order to secure a better understanding of the situation of the CFI and of the possible impact of the current proposal, the Committee on Legal Affairs and Citizens' Rights heard Mr SAGGIO, President of the Court of First Instance, and Mr JUNG, Registrar, at its meeting of 3 and 4 November 1997, Mr FORWOOD and Mr COLLIN from the Council of the Bars and Law Societies of the European Union (CCBE) at its meeting of 2 and 3 February 1998, Mr PIRIS, Mr GARZÓN CLARIANA and Mr DEWOST, respectively Jurisconsults of the Council, the European Parliament and the Commission, at its meeting of 27 and 28 April 1998 and the President of the CFI, Mr VESTERDORF, at its meeting of 24 June 1998.

The CFI justifies the current proposal as a means of exhausting all the possibilities of improving the way the Court operates in its present composition and of increasing the number of cases which could be dealt with by the present number of Judges. The CFI admits, however, that 'in the event of a constant and substantial increase in judicial business, an increase in the number of Judges of the Court and, depending on circumstances, the creation of new, specialised Chambers could become **inevitable**'<sup>(1)</sup>.

The question is, therefore, whether the proposal responds to the present and foreseeable needs of the CFI. In this context, Parliament is concerned with the credibility and public acceptance of the Community legal system. In particular, the current length of proceedings (an average of 29.3 months in 1997) is difficult to accept.

The Court's proposal of 7 February 1997 makes it clear that the volume of litigation relating to the Community trade mark will seriously affect the CFI's workload.

The Committee on Legal Affairs and Citizens' Rights remains in favour of the current composition in Chambers, since it guarantees that various legal cultures are represented and, ipso facto, strengthens the credibility of the CFI's rulings. Despite reservations, it nevertheless takes the view that, given the likely excessive workload of the CFI, the CFI might give decisions when constituted by a single Judge, provided that the cases involved are repetitive and of very minor importance. If

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<sup>(1)</sup> See proposal, p. 3, 2nd paragraph.

this should happen, the Committee on Legal Affairs and Citizens' Rights takes the view that the Court of Justice should submit to Parliament and the Council a report giving an assessment of the application of this Decision three years after its entry into force.

The Committee on Legal Affairs and Citizens' Rights also shares the Commission's opinion that consideration should be given, as a matter of urgency, to a reform of the Community legal system in the light of enlargement.

**CASES REGISTERED AT THE COURT**

Type of action	1989	1990	1991	1992	1993	1994	1995	1996	1997
Actions brought by Community staff	92	43	81	79	83	81	79	98	155
Other actions	77	12	12	36	111	143	133	117	146
Milk quotas					395	173	32	5	28
Customs agents									295
<b>TOTAL</b>	<b>169</b>	<b>55</b>	<b>93</b>	<b>115</b>	<b>589</b>	<b>397</b>	<b>244</b>	<b>220</b>	<b>624</b>
Referred back by the Court	153				451	14			

**CASES PENDING BEFORE THE COURT AS AT 31 DECEMBER**

Type of action	1989	1990	1991	1992	1993	1994	1995	1996	1997
Actions brought by Community staff	91	63	96	99	103	106	121	140	214
Other actions	77	80	73	68	159	254	260	288	345
Milk quotas					395	258	231	227	252
Customs agents									295
<b>TOTAL</b>	<b>168</b>	<b>143</b>	<b>169</b>	<b>167</b>	<b>657</b>	<b>618</b>	<b>612</b>	<b>655</b>	<b>1106</b>

**DURATION OF PROCEEDINGS (in months) - RULINGS**

	1990	1991	1992	1993	1994	1995	1996	1997
Actions brought by Community staff	17,9	21,9	17,0	17,0	15,2	19,9	19,1	18,7
Other actions	17,6	42,9	36,6	23,3	22,4	41,3	28,3	29,3

**OPINION**

(Rule 147 of the Rules of Procedure)

for the Committee on Legal Affairs and Citizens' Rights

on the draft Council Decision amending Council Decision 88/591/ECSC/EEC/Euratom establishing the Court of First Instance of the European Communities to enable it to give decisions in cases when constituted by a single Judge (6290/97 - C4-0218/97 - 97/0908(CNS)) (report by Mr D. Martin)

Committee on Institutional Affairs

Letter from the committee chairman to Mr De Clercq, chairman of the Committee on Legal Affairs and Citizens' Rights

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Brussels, 23 June 1997

Dear Mr De Clercq,

Subject: Draft Council Decision 6290/97 JUR 67 COUR 4 - C4-0218/97

At its meeting of 18 and 19 June 1997, the Committee on Institutional Affairs<sup>(1)</sup> delivered an opinion in favour of amending the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities to enable the Court of First Instance to give decisions in cases when constituted by a single Judge.

Yours sincerely,

Biagio De Giovanni

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<sup>(1)</sup> The following were present for the vote: De Giovanni, chairman; Lucas Pires, Corbett and Berthu, vice-chairmen; Brinkhorst (for Frischenschlager), Cederschiöld (for Anastassopoulos), B. Donnelly, Dury, Hager (for Vanhecke), Herman, Herzog, Izquierdo Rojo, Neyts, Paasilinna (for Barros Moura), Salafranca, Spaak, Tsatsos and Voggenhuber.